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Brief of Bunn for C. C.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

No. 1092.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

In Error to the Supreme Court of Minnesota.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR SO FAR AS CONCERNS NORTHERN PACIFIC LANDS.

C. W. BUNN,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 102.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

STATEMENT.

This is a writ of error from a final judgment of the supreme court of Minnesota, that being the highest court of the state. The opinion of the supreme court of Minnesota is printed in the Transcript, pp. 58 to 70, and reported in 72 Minn., p. 200.

The question here is, whether a certain act of the legislature of Minnesota, Laws 1895, chap. 168, violates the obligation of a contract. Briefly stated said law provides that all lands heretofore or here-

after granted by the state of Minnesota, or the United States, or the territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed (except such as are actually used for railroad purposes); and the law also provides that said railroad company shall continue to pay taxes into the state treasury upon its gross earnings in the same manner and in the same amount as now required by law; all laws providing for the exemption of such lands or for their taxation in any special or different manner are repealed.

The contract, which we assert has been violated, is contained in Special Laws of Minnesota, chap. 8, March 3, 1865, and Special Laws of Minnesota, chap. 65, March 4, 1870. The first of these laws provides in brief that the lands granted by the state to aid the construction of the Lake Superior and Mississippi Railroad shall be taxed in this manner; that the railroad company shall pay into the treasury of the state annually 3 per cent. of the gross earnings of the railroad, and this payment shall be in full of all tax and assessment whatever. The special act of 1870 referred to applies the act of 1865 to the Northern Pacific Railroad Company, which had been incorporated in 1864 by the act of Congress of July 2, and which road had not then been constructed through the state of Minnesota.

The proposition held by the state court was that there was no contract because these laws of 1865 and 1870 were void, being in conflict with the constitution of the state, adopted in 1858, Article IX, sections 1 and 3; which provide

in brief that all taxes shall be as nearly equal as may be, and all property on which taxes are levied shall have a cash valuation and be equalized and uniform throughout the state; and that laws shall be passed taxing all moneys, credits and investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money. 72 Minn. 220-224.

The decision of the state court is as we shall show not conclusive upon this point. It is for this court to decide whether the obligation of a contract has been violated; and this involves two inquiries, (a) whether there was a contract, (b) whether its obligation was violated.

For the proper understanding and presentation of this question a somewhat more detailed statement of the facts is necessary.

The constitution of the state was adopted in 1858, and Article IX, sections 1 and 3 read as follows:

> "Section 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state."
>
> "Section 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for

any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

In 1865 the state was trustee under an act of Congress of certain land grants made by Congress to the state in trust to promote and secure the construction of certain lines of railroad, among others the Lake Superior and Mississippi Railroad, to extend from St. Paul on the Mississippi river to Lake Superior. The Lake Superior and Mississippi Railroad Company had been incorporated for this work, but had not entered on the construction, and it was at that time uncertain when the proposed road would be built or whether it would be built at all. The state, in order to secure the construction of this road, passed chapter 8 Special Laws of 1865, which reads as follows:

Section 1. That whenever any lands heretofore or hereafter granted to the Lake Superior and Mississippi Railroad Company, to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in no wise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessee therein may and shall, in case of default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper of-

ficers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. Provided, that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March, in each and every year, pay into the treasury of the state, one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next, after thirty miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March, of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad; and the payment of such *per centum* annually, as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the governor of this state, or any other person appointed by law to examine under oath the officers and employees of said company, or other persons; and if any person so

examined by the governor or other authorized person shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid *per centum*, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate, and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

Sec. 2. That upon the filing by said company in the office of the secretary of state of a notification of its acceptance of this act the same shall become obligatory upon the state and upon said company, provided that said notification shall be given within sixty days.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved March 3, 1865.

On July 2, 1864, the Northern Pacific Railroad Company was chartered by act of Congress to build a railroad from Lake Superior to Puget Sound, which would extend through the state of Minnesota. By section 17 of the Congressional Charter the company was authorized to accept "any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred upon said company by the Congress of the United States or by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to its own use for the purpose aforesaid." By section 18 it was enacted that the company should obtain the

consent of the legislature of any state through which any portion of its road might pass previous to commencing construction. The company under its charter had a congressional land grant lying partly within the state of Minnesota, extending across the Northern part of the state from East to West. This land was public land of the United States at that time and had not been earned or acquired by the Northern Pacific company when the act of 1870 was passed.

In this condition of things the Legislature of Minnesota passed chapter 65 Special Laws of 1870, which reads as follows:

> Section 1. That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as is provided in and by an act entitled "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," approved March third, eighteen hundred sixty-five. *Provided, however,* That the gross earnings of said railroad company on which a percentage is to be paid to the state shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this state.
>
> Sec. 2. That said Northern Pacific Railroad Company shall have the right and authority to acquire and hold lands for right of way, depot grounds, and for all necessary purposes of said company in all respects as provided by the general laws of this state, as set forth in

sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of general statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceeding, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company, the right of way through and over any lands of this state to the same extent as is granted by act of Congress through and over the public lands to said company.

Sec. 3. That whenever the Northern Pacific Railroad Company shall connect with or cross the route or line of any other railroad within the limits of this state and a portion of the routes or lines of said railroads shall be parallel or coterminous, such portions may by agreement of the companies interested therein, be blended in one track, or a double track and side tracks, and may be owned and used in common for such length of time and upon such terms as may be agreed upon by said companies, and said companies shall thereby be held to have complied with the requirements of their respective charters in that particular, the same as if independent tracks had been built by each.

Sec. 4. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage. *Provided,* Said Northern Pacific Railroad Company shall within ninety days from the approval of the same file with the governor a notice of the acceptance by said company of the terms and conditions of this act.

Approved March 4, 1870.

The Northern Pacific Railroad Company had been authorized to construct its road and exercise its franchises in the state of Minnesota by the act

of the Legislature of that state approved March 2, 1865 (Transcript, pp. 19-20). It filed an acceptance of the terms and conditions of the act of March 4, 1870, and thereafter constructed its road through the state of Minnesota in reliance thereon (Transcript, p. 20). The percentage of the gross earnings of said railroad provided to be paid by these laws has been duly paid by the Northern Pacific Company to the treasurer of the state of Minnesota each year (Transcript, p. 20). The bill of exceptions settled on the trial shows that the parties admitted these facts in the record (See Transcript, pp. 54-55).

The answer alleges that a certain parcel of land involved in this proceeding was a part of the said Congressional land grant of the Northern Pacific Railroad Company, and that the said act of the state of Minnesota approved March 4, 1870, and the acceptance of the same filed as aforesaid constitute a contract between the Railroad Company and the state, and asserts that the attempted repeal by the legislative act of 1895 without the consent of the company violates the obligation of said contract, contrary to the provisions of the constitution of the United States.

The controversy here before the court arises in this way: James N. Marr, a tax-payer of Aitkin County, Minnesota, represented by the Attorney General of the state, filed a petition in the name of the state for a writ of mandamus against Fred Stearns as County Auditor of Aitkin County, Minnesota, praying for a writ commanding Stearns as

County Auditor to place on the tax list of Aitkin County certain parcels of land (Transcript, pp. 4-6). The writ being issued, Fred Stearns as County Auditor answered, setting up that certain of the lands described in the petition were lands of the St. Paul & Duluth Railroad Company, certain of them lands of the Northern Pacific Railroad Company, and certain of them lands of the Great Northern Railway Company; the answer also pleaded the facts in each case upon which these lands were claimed not to be subject to the taxation attempted to be imposed. The answer is in the Transcript, pp. 10-24; the case was tried before the court, findings made and a bill of exceptions settled. The findings are Transcript, pp. 28-38, the bill of exceptions Transcript, pp. 39-56. A final judgment was awarded in the trial court granting a peremptory writ of mandamus as prayed (Transcript, pp. 38-39). Appeal was taken to the supreme court of Minnesota, where the judgment of the trial court was affirmed (Transcript, p. 70). This writ of error brings up the said final judgment of the supreme court of Minnesota.

ASSIGNMENTS OF ERROR.

1. The court below erred in holding and ruling that the said laws of March 3, 1865, and March 4, 1870, did not constitute a contract between the state of Minnesota and the Northern Pacific Rail-

road Company not subject to repeal or modification without the consent of the company.

2. The court below erred in holding and ruling that said Chapter 168, Laws of 1895, is not a law violating the obligation of the contract between the state and the Northern Pacific Railroad Company, and in violation consequently of the Constitution of the United States.

ARGUMENT.

1.

Whether the laws of 1865 *and* 1870 *were valid laws and constitute a contract is a question for this court and the decision of the state court is not binding here.*

At first sight it might be thought that the construction placed by the supreme court of a state on the constitution of the state being ordinarily binding on this court, and the laws of 1865 and 1870 in question having been held by the state court not to make a contract, because they were in violation of the state constitution, that that conclusion is also binding on this court. But while under ordinary circumstances this court will follow the decisions of the state court as to the construction of the laws and constitution of the state, that principle does not apply to a case where the very point

in controversy is that those laws constitute a contract violated by some subsequent state statute. In such a case this court must either abdicate its jurisdiction entirely or must decide for itself whether there is in the first instance a contract. Whether the obligation of a contract has been violated is a question arising under the constitution of the United States and within the jurisdiction granted to this court by the constitution and acts of Congress. In order to determine whether the obligation of a contract has been violated it is essential first to determine whether there was a contract. The one question necessarily includes the other. And when this court inquires whether a contract has been violated it must first determine for itself whether there was a contract. If in order to decide whether there was a contract the court must construe the constitution or laws of a state, the validity, scope and effect of those laws becomes a necessary part of the question. *Mobile & Ohio Railroad Co. v. Tennessee*, 153 U. S. 486, 492 and cases cited: *Jefferson Branch Bank v. Skelly*, 1 Black 436, 443.

II.

It has been held in this court from the beginning that a state may by contract to that effect, based upon consideration, exempt the property of an individual or corporation from taxation for any specified period or permanently; and that where an act

or charter contains an exemption in consideration that taxes shall be paid to a specified amount or upon a particular basis, this arrangement is presumed to be on sufficient consideration and consequently binding upon the state. *State of New Jersey v. Wilson,* 7 Cranch., 164; *Gordon v. Appeal Tax Court,* 3 How., 133; *State Bank of Ohio v. Knoop,* 16 How., 369; *The Jefferson Branch Bank v. Skelly,* 1 Black., 436; *University v. People,* 99 U. S., 309; *Asylum v. New Orleans,* 105 U. S., 362; *Pearsall v. Great Northern Ry. Co.,* 161 U. S., 662; *Mobile & Ohio Railroad Co. v. Tennessee,* 153 U. S., 486.

III.

That the said acts of 1865 and 1870 constitute contracts *in form* is plain. The act of 1865 was passed before the construction of the Lake Superior and Mississippi Railroad had commenced, before an acre of its land grant had been accepted or earned. It was part of the terms on which the company agreed to take the grant and to undertake the construction of the railroad. It provides in section 2 that upon the filing by the company in the office of the secretary of state of an acceptance of the act; the same shall be *obligatory upon the state and upon said company.*

The act of 1870, which applies the last named law to the Northern Pacific Railroad Company and

its land grant, is equally clear. It was passed before the Northern Pacific road had been commenced; before an acre of the land grant had been earned. In the record it is agreed that the road was constructed in reliance upon this act. The act applies to the Northern Pacific Company and its grant all the provisions of the act of 1865 in favor of the Lake Superior and Mississippi Railroad Company. Section 4 requires that the Northern Pacific Railroad Company shall within ninety days file with the governor "a notice of the acceptance by said company of the terms and conditions of this act." This acceptance was filed. These acts constitute a contract in form and were intended as a contract by the Legislature and by the company.

In the case of *State on Relation of Marr v. Luther,* 56 Minn. 156, the act of 1865 was considered and it was held to apply until the lands were sold contracted to be sold, or leased by the Railroad Company, the supreme court saying (p. 159): "The effect of this by necessary implication was that until sold, contracted to be sold, or leased, the lands were to be entirely exempt from taxation in the ordinary way."

This case is readily distinguishable from that line of authorities which holds that a mere gratuitous exemption by general law or special law, not based upon consideration and not amounting to a contract, is subject to repeal by subsequent legislation. Here the consideration of the law was the construction of the road, the acceptance of the

grant and the agreement to pay the gross earnings tax, all of which were undertaken by the railroad in reliance upon the law. Many millions of dollars have been expended by the Northern Pacific Railroad Company, perhaps without any income or return, in reliance upon the proposition of the State that the lands should not be taxed except through a payment of three per centum of the earnings of the road.

That the acts constituted a contract in form and that there was ample consideration for them has been decided over and over again by the supreme court of Minnesota. In the case of *First Division St. Paul and Pacific Company v. Parcher,* 14 Minn. (Gil. ed.) p. 224, the question was considered of similar acts passed in territorial times and the court said, on page 249:

> "In support of this ground of demurrer the defendants argue—*First*, that the taxing power is a sovereign power, and hence that it is not competent for a legislature to alienate or abridge it unless authorized so to do by the people. The charter granted in May, 1857, constituted a contract between the territory and the Minnesota & Pacific Railroad Company, one of the terms of which was that the lands granted in aid of the road should be exempt from taxation till sold and conveyed by the company. That the exemption thus conferred is a contract right—a right which a legislature, in the absence of constitutional inhibition, is competent to grant, and inviolable—has been settled in a series of decisions by the Supreme Court of the United States, so that the matter is not open to discussion. *State of New Jersey v. Wilson,* 7 Cranch. 164; *Gordon v. Appeal Tax Court,* 3 How. 133.

Again the court said, on page 251:

> "It is also urged by the defendants that the exemption from taxation was granted to the Minnesota & Pacific Railroad Company without consideration, and that, therefore, it does not come within the principle of the decisions of the federal supreme court before cited, but it is rather to be classed among the *privilegia favorabilia* spoken of in *Rector, etc., of Christ Church v. County of Philadelphia,* 24 How. 300, and may, therefore, be revoked at the pleasure of the sovereign. We are of the opinion that a sufficient consideration is to be found in the agreement of the company to construct the road, and to fulfill the other duties imposed by the charter, and among them to pay 3 per centum of the gross earnings of the road into the treasury of the territory or future state.

In *State v. Winona & St. Peter R. R. Co.,* 21 Minn. 472, the court by Chief Justice Gilfillan in considering the act of 1857 providing for payment of a gross earnings tax and exemption from other taxes of the lands until sold, said:

> "This is a contract between the state and the company and whether it is provident or improvident each must abide by it according to its true intent."

In *City of St. Paul v. St. Paul and Sioux City Railroad Co.,* 23 Minn. 469, 475, referring to the act of 1857, granting lands to the Root River Valley & Southern Minnesota R. R. Co., as amended by the act of 1864, the court says:

> "This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by

both the executive and legislative departments of the state government, but, by an express constitutional amendment adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

In *St. Paul and Chicago Ry. Co. v. McDonald*, 34 Minn. 195, 209, the court by Justice Mitchell in regard to a similar contract says:

> "The state should and must in letter and spirit, religiously keep its contract obligations; but the law will not tolerate the use of mere forms to evade its spirit."

In *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 467, the court said:

> "For the prior enactment embodied the elements of a contract between the state and the corporation which had been in force and acted upon both by the state and by the company for many years, and its annulment by the act of the state alone was impossible under the federal constitution."

It is not out of place to call the attention of this court to the history of the taxation of land grants in Minnesota as stated by the highest court of that state in the Parcher case. On page 253 the court said:

> "In addition to what was there said, it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature. The state was then almost a wilderness. Its population was small and sparse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the

> products of the state was a matter of prime and pressing necessity. The inducements which we were able to hold out to secure this outlet and the construction of needed lines of railway consisted rather in what the state was to be than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon the railroads in this state would prove remunerative to their owners, as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all the roads, lands and franchises, together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862 that the first ten miles of railway were put in operation in this state. These facts are not without weight in considering whether the grants of lands, without the exemption from taxation, would probably have induced capital to undertake the construction of the roads, especially when we take into account the proverbially high rates of taxation in newly-settled communities."

Again, in the case of *City of St. Paul v. St. Paul and Sioux City Railway Company,* 23 Minn. 471, the same court said:

> "It is a part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state and every portion thereof so far as possible an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known history that in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four

original land-grant companies in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of these lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated as a basis of taxation the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury for the benefit of the whole state was provided for in lieu of all taxes whatsoever. This, it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and productive to the revenues of the state, and clearly more just and equal to all localities therein, as all would share equally in the benefit to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy and realizing the expectations of its founders."

That these acts constitute a contract (provided the acts were valid laws) is not doubtful under the decisions of this court. *Pacific Railroad Co. v. Maguire*, 20 Wall. 36; *Farrington v. Tennessee*, 95 U. S. 679.

IV.

The constitution of Minnesota, adopted in 1858, *sections* 1 *and* 3 *of Article IX, have no application to the property in question.*

Passing for the present any consideration of the proper construction of these constitutional provisions, the fact must be admitted that they have no application to property conveyed by the United States to the state in trust to aid works of internal improvement, nor to lands of the United States. Such property could not be taxed by the state in any event. The state cannot tax the lands of the United States. The constitutional provisions relate to *private* property only and must be read as if this qualification were written in them.

When the laws of 1865 and 1870 in question were passed the lands involved in this suit now belonging to the Northern Pacific Railroad Company were property of the United States, and the lands involved in this suit belonging to the St. Paul and Duluth Railroad Company were lands conveyed by the United States in trust to the state of Minnesota to aid the construction of a railroad from the Mississippi river to Lake Superior. At that time the constitutional limitations on legislative power of Article IX had no application to either class of lands. Such lands passed into private ownership with the privilege of commuted taxation created with respect to them and impressed upon them

while they were yet public lands. The history of the transaction as shown in the quotations before made in the opinions of the supreme court of Minnesota is, that when these laws were passed the state was almost a wilderness, its population small and sparse, its capital limited, its business depressed, its resources undeveloped. In 1865 there were very few miles of railroad within its borders. An outlet for the products of the state was a matter of prime and pressing necessity. The state had not succeeded in spite of repeated and continued offers in securing the construction of railroads. It was not until 1862 that the first 10 miles of railway were built in the state. We are authorized to infer, as the supreme court of Minnesota has said, that without the offer of the contract in question capital could probably not have been induced to undertake the construction of the roads, at least for years to come, and that the state received in the contract a fair and full equivalent for all future taxes.

These lands were not subject to taxation so long as they remained public lands. They could not be taxed until after they passed into private ownership. So long as they remained public lands they were not subject to the taxing power of the state nor to the limitations on that power expressed in Article IX of the constitution. These limitations are not more extensive than the taxing power itself which they limit. That power and the limitations apply to private property only. Now, in order to get a private corporation to build a railroad the

state found it necessary to make a certain contract; it accepted the construction of the road and perpetual payment of three per cent. of its gross earnings to the state and granted in consideration thereof freedom from any other form of taxation until the lands were sold. Thereby the right, immunity or privilege to pay taxes by a percentage of railroad earnings was impressed upon the land while it was yet public property. Subject to this privilege or immunity it passed into private ownership. The immunity attached to the title before the company accepted or earned the lands. The constitution of the state cannot be held to have intended to prevent the state from making such bargains as to its own public domain, or as to government land within its borders, if it found such contracts reasonable and necessary to secure works of internal improvement. And whether such contracts were reasonable or necessary is a question which was settled by the Legislature.

This argument was pressed upon the supreme court of Minnesota and was overruled (72 Minn. pp. 223-4). But it is evidently a question for this court to determine whether the contract of a state with respect to the public domain of the United States, or with respect to land of the United States of which the state is trustee, made with respect to lands which were not subject to the taxing power of the state, or to its constitutional provisions touching taxation, by means of which contract the state has induced private owners to take the lands and the benefits of which contract the state has

received and retained for 30 years, can be held no contract because of provisions in the state constitution; which provisions it is urged have no application to the property or to the contract in question. And the argument we make is supported by authority. The decision of the court below on this point is, so far as we know, supported by no authority and none is referred to by the state Supreme court.

(a) *Our contention is we think sustained by the Parcher case*, 14 Minn. 297. In that case a franchise, land grant and right to pay taxes by gross earnings connected therewith, granted before the adoption of the constitution, became forfeited to the state after the constitution was adopted, and was re-granted by the state to the First Division St. Paul & Pacific Railroad Company. This re-grant was after the constitution was adopted. The case was one therefore where a land grant and franchise to build a railroad coupled with a per cent. gross earnings provision, which had been made by the territory before the admission of the state, being forfeited and falling back into the hands of the state, *a new grant* was made by the state legislature to a new corporation after the adoption of the constitution, which grant professed to convey intact the franchise, land grant and immunity from ordinary taxation in consideration of a gross earnings payment. The constitutionality of this re-grant being attacked as invalid under the constitution of 1858, the court after elaborate considera-

tion held that the legislature had power to make the contract. This decision can only be supported on the theory which we advance, that the provisions of the constitution had no application to a grant and contract made by the legislature with respect to the public domain. It is true the main attack in that case and the main argument in the opinion of the court is based upon other provisions of the constitution. But the court held that the grant was constitutional, including the privilege of commuted taxation, and the decision must be held therefore to have settled that the grant was valid notwithstanding the provision in the constitution as to uniformity of taxation. This decision was made in 1869. It was a noted case and became at once a recognized rule of property and is the foundation on which rests a large part of the railroad and land grant investments within the state of Minnesota. It has always been followed. The legislature the next year thereafter passed the act in question applicable to the Northern Pacific Railroad grant and there cannot be a doubt that the Minnesota courts, legislature, executive, and people, as well as the railroad companies, then considered the Parcher decision as settling the validity of such legislation. It is a rule well founded in justice and authority that the law as then settled must control as to the validity and effect of the contract and that this court will apply that law, ignoring a later decision of the state court which would have the effect to violate the contract. *Havemeyer v. Iowa County*, 3 Wall. 294; *Gelpcke v. City Dubuque*, 1 Wall. 175;

Chicago v. Sheldon, 9 Wall. 50; *Olcott v. Supervisors,* 16 Wall. 678; *Louisiana v. Pilsbury,* 105 U. S. 278, 294. It will be noted that in this case the state court gave effect to a subsequent *statute* of the state repealing law constituting the alleged contract and the case is not therefore controlled by *Bacon v. Texas,* 163 U. S. 207, and cases there cited.

(b) *Our contention is sustained by the decisions of other courts.* In *Illinois Central Railroad Co. v. The County of McLean,* 17 Ill. 291, public lands had been granted to the Illinois Central Railroad Company under a contract that they should be taxed by the railroad company paying a percentage of its gross earnings into the state treasury, and taxed in no other way. The validity of this contract was challenged upon provisions of the Illinois constitution more or less similar to those in question contained in the Minnesota constitution. But the court said (p. 296):

> "The case before us is not an exemption or immunity from the payment of taxes. Nor do I hold to a power to discriminate and exempt the owners of the same kinds of property provided to be taxed, or a change of the rule of valuation and assessment. But the exemption of the donated lands may be regarded as an exemption of the *public property until its sale, or the performance of the conditions which will release the lien of the state.*"

In the act of 1865 in question is contained a provision that the state shall have a lien upon the railroad and all the property of the company to secure to the state the payment of three per cent. an-

nually of its gross earnings, and that such lien shall take precedence of all demands, decrees and judgments against the company. A similar provision was in the grant to the Illinois Central Railroad Company considered in the County of McLean case. In a separate opinion in that case by Skinner, Judge, p. 298, that Judge concurred in the majority opinion on the ground that the land was public property not subject to taxation; and the retention of a lien on it by the state removed it entirely from the provisions of the constitution providing for uniformity of taxation.

In the case of *People v. Auditor General,* 7 Mich. 84, the court considered a case where land had been granted to the state by the national government for the construction of a canal. The grant was accepted by the state and a contract was entered into by the state with the canal company stipulating for the remission of taxes on the granted lands for the period of five years. This remission of taxes was challenged as being contrary to the rule of uniformity of taxation provided for in the constitution of Michigan. But the court said (pp. 89-90):

> "It is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from Congress, or by sale to a purchaser, before the passage of the act in question, so that the right of taxation had accrued to the state. It was granted to the state for the specific purpose of being applied, either by sale or appropriation, to the purposes of the construction of the canal. As such, it assumed the character of a fund, to be expended under the direction of the state; and so the legislature evidently regarded

it, and that the state held such land only as trustee for the accomplishment of that purpose."

"Instead of selling the lands, and appropriating the avails towards the construction of the canal, the legislature found it desirable, if not necessary, to appropriate the lands themselves. From the course of legislation we may presume that this appropriation of the lands, was found to be insufficient of itself to induce any one to undertake the work, and that in order to render it sufficient, the state authorized the contract for the remission of the taxes thereon. This authority was given, and the contract executed, while the lands were in a condition in which they could not be taxed, and until such right of taxation had accrued to the state, it was not within the scope of either its constitutional or legislative provisions. The state had power to contract with the company to convey the lands after five years, and thus relieve them during that period from taxes, and if it might do this, it is difficult to find a reason why it might not so convey them as to secure the same exemption from taxation. In making this contract the state acted as the trustee of the general government; in the law authorizing the contract, it was dealing with the subject of the trust, over which no right of taxation then existed."

The character of these lands and how they differ from ordinary private property was well explained in the opinion of Mr. Justice Peckham, in *McHenry v. Alford*, 168 U. S. 651, 665-668.

This question may be illustrated by reference to three classes of lands; (a) lands like those of the St. Paul and Duluth, granted by congress to the state in trust, (b) lands of the United States like the lands of the Northern Pacific herein, (c) pub-

lic domain of the state like school sections and swamp lands.

First, as to lands granted by congress to the state in trust. Such lands need not have been conveyed to a railway company at all. The trust defined in the act of congress was "to aid the construction" of a certain railway. The state was left to pass such law as might be found advisable, fixing the manner of the execution of the trust. As said by the supreme court of Michigan in the case above cited, the state might have contracted to convey the lands to the company after the expiration of a term of years, during which term they would not have been taxable; and indeed the state might have enacted that it would retain itself the title to the land and sell them, turning over the proceeds to the railway company. Under any such condition the lands would have remained untaxable. But the state saw fit on considerations of convenience and general benefit to convey the lands immediately to the railway company and allow it to dispose of them. No good reason we think can be advanced why, if the lands could have been held by the state untaxable the trust title cannot be vested in the company by contract, with the provision that they shall be in that condition untaxable, or taxable only in a certain manner.

Second, as to lands of the United States, like those of the Northern Pacific here in question. The state had under the charter of the Northern Pacific Railroad absolute veto power on the construction of the road through Minnesota and on the acquisi-

tion of these lands by the company. This absolute power included the right of the state to have given a conditional consent and to have said to the company, that it might construct its road through Minnesota in consideration of releasing or conveying to the state its land grant within the state; either on terms that the proceeds of such land should be turned over, as the lands were sold, to the company, or that they should be devoted to any other purpose of the state. If such condition had been imposed and consented to by the company, that would have made a contract within the power of the state to make. Now, instead of saying this the state said to the company, you may build your road and take the title to these lands from congress in consideration of your paying to the state three per cent. of the gross earnings, the lands to be taxable in no other manner.

Third, take the case of public lands belonging to the state. Suppose they can not be sold upon ordinary terms and conditions; suppose unless inducements are offered they must forever remain the property of the state and untaxable; suppose the state finds it necessary in order to get private owners to accept them to make certain contracts with respect to taxation; this may be considered either with reference to strictly private property of the state sold for private purposes, or to public lands conveyed to an educational or other public institution created by the state.

In any of these cases it is taking an extremely narrow view to say that the state has no right to

make a *bona fide* contract under which it gets the full benefit of taxation, under which it receives a full *quid pro quo*; and this case must be considered as if the state did receive a full *quid pro quo,* because we are discussing the power of the legislature, not the wisdom of its contract. In any of the cases supposed the state is not bargaining away any present right which it has to tax the lands. It is parting with nothing. Rather it is providing for the creation of new property which would not otherwise come into existence, and in consideration of such new property being created by a private owner the state bargains for and receives a large benefit. The case is not distinguishable from that which has been frequently passed on by this court with respect to which this court said in *Jefferson Bank v. Skelly,* 1 Black, 436, 446:

> "This court has also decided that the charter of a bank is a franchise which is not taxable as such, if a price has been paid for it which the legislature has accepted with a declaration that it shall be in lieu of all other taxation."

See also *State of New Jersey v. Wilson,* 7 Cranch 164; *Gordon v. Appeal Tax Court,* 3 How. 133.

It must not be forgotten that the state is a sovereign. It has power to grant charters and franchises, and to make contracts. No provision of the constitution restricts in terms its power to *contract.* It is not reasonable to infer a restriction of that power from a constitutional provision that taxes shall be levied uniformly on all property at its true value. Can such a provision be held to for-

bid a contract by which the legislature secures a full equivalent for taxes?

V.

The alleged contract was acted on in good faith and executed. It has been treated as valid by all departments of the state government for thirty years and was never attacked until the passage of the act of 1895. *This long practical construction, the long continued payment of the gross earnings percentage, with the investments which have been made in the state, forbid that this construction should now be changed to the detriment of vested rights.*

Without considering for the present whether the court below is correct in its interpretation of the state constitution as an original question, we wish to explain the history of legislation in Minnesota and show the *practical* construction which the constitution has received from all departments of the state government; and also to state in a general way the vested rights which have accrued in reliance thereon.

The system of providing for taxation of railroad lands through payment of a percentage of the gross earnings of the road in lieu of other taxes was universally in vogue in Minnesota in territorial times, and after the admission of the state and the adoption of the constitution in 1858 the Legislature invariably assumed that it continued to possess the

same power, whether the railroad grant was the absolute property of the state or was public land of the United States. This was the practice not only as to old grants adopted before the constitution, but also as to new grants both state and congressional made after that date.

In the case of *First Division of St. Paul & Pacific Railroad Co. v. Parcher,* 14 Minn. 224, the court considered the question of territorial grants made before the adoption of the constitution and held that where such franchises and grants had been forfeited and reverted to the state it was competent for the state to hold them with the railroad and property connected therewith without merger or extinguishment, and to transfer them over after the adoption of the constitution to another company with all the original immunities and privileges as to taxation, without such transfer being in violation of the constitution theretofore adopted. The Parcher decision has been repeatedly followed in the supreme court of Minnesota and has become the settled law of the state. See *County of Stevens v. St. Paul, Minneapolis & Manitoba Railway,* 36 Minn. 467, and cases cited in the opinion on page 470. The major part of the railroad lands in Minnesota was granted under territorial grants and come under the rule of the Parcher case and the authorities following it. All such territorial grants are valid contracts and cannot be affected by the act of 1895 in question.

To show the course of legislation on this subject

after the adoption of the constitution, we cannot do better than to quote from the opinion of the supreme court of Minnesota in *State v. Luther,* 56 Minn., pp. 163-4:

> "Among the congressional grants made subsequently to the adoption of the constitution to aid in the construction of railroads in this state, are the act of March 3, 1865, (13 U. S. Stat., p. 526), increasing the grant of 1857 to ten sections per mile; the act of May 5, 1864, (13 U. S. Stat., p. 64), making a grant to aid in the construction of a road from St. Paul to Lake Superior; the act of May 12, 1864, (13 U. S. Stat., ch. 84, sec. 7, p. 74), granting four additional sections per mile to aid in the construction of a road from St. Paul and St. Anthony to the southern line of the state; the act of July 4, 1866, (14 U. S. Stat., p. 87), making a grant to aid the construction of what is called the Hastings & Dakota Railroad; the act of July 2, 1864, (13 U. S. Stat., p. 365), making a grant directly to the Northern Pacific Company to aid in the construction of its road.
>
> "Among the grants made by the state itself for like purposes were that of March 6, 1863, (Sp. Laws 1863, ch. 4), of swamp lands to the St. Paul & Pacific Company to aid the construction of a road from St. Paul to Winona; the act of February 16, 1865, (Sp. Laws 1865, ch. 1), granting swamp lands to aid the construction of the Southern Minnesota Railroad; the act of March 8, 1861, (Sp. Laws 1861, ch. 1, sec. 18), making a grant of swamp lands (to which the lands here in controversy in part belong) to aid in the construction of the road from St. Paul to Lake Superior.
>
> "And in every instance the legislature, in making or transferring the grant to the railway company, provided for the exemption of the lands from ordinary taxation while owned by the company, in consideration of its pay-

ing to the state, annually, a certain percentage of the gross earnings of the road. They provided for the same system of taxation for the Northern Pacific Company, which received its grant directly from congress. Sp. Laws 1870, ch. 65, sec. 1.

"In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the state by congress for the same purpose, (and which, while thus held by the state, either as proprietor or in trust, were, of course, not subject to taxation), it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the state a single grant of lands to aid the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871 (Const., Art. 4, sec. 32a,) where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

The same class of legislation was extended to other subjects besides railroads and railroad land grants. In the first tax law passed after the adoption of the constitution (chap. 1, Gen. Laws 1860) the legislature in section 2 made a provision by which the tax payer could off set against the assessment of credits any indebtedness which he might owe. Although this provision would be unconstitutional according to a technical and literal reading

of section 3, article IX *supra*, and had been so decided in Ohio before we adopted the section (*Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1) it has always remained a feature of the tax laws of Minnesota. It has been in force and universally acted upon for 39 years. And in *State v. Moffett*, 64 Minn. 292, the constitutionality of the act being challenged, the court declined to consider the subject upon its merits, or to indicate what conclusion might be arrived at if the question were an open one, saying:

> "We regard the point submitted as foreclosed by the practical construction which has been placed upon sections 1 and 3 of article IX for almost 40 years, really during the entire period of statehood, by the legislative, executive, and judicial branches of the state government."

The court goes on to show that in 1860 such a provision was introduced into the tax law, where it has always remained. In 1864 the attorney general of the state rendered an opinion that the law was unconstitutional, but notwithstanding this opinion the executive department of the state has always recognized the validity of the law, the legislative department has gone on the theory that it was valid, and it had silently been taken for granted in the judicial department; and that in this construction the people of the entire state had acquiesced for nearly two score years.

It thus appears as if in the state court 40 years of practical construction is sufficient to make valid one class of legislation; and not sufficient to make valid another class of legislation, the objection being the

same against both and the practical construction being the same in both cases. There is really no difference between the two cases except the inclination and desire of the state court to hold one piece of legislation valid and the other piece invalid.

In 1872, amended in 1876, the legislature of Minnesota passed an act for the taxation of insurance companies by a percentage of the premiums in lieu of other taxes on all real and personal property (see Gen. Stats. 1878, sec. 315, p. 433). Taxation of insurance companies by the same method has prevailed ever since without question and goes on in the state of Minnesota today.

Mining companies were taxed under the law of Minnesota according to the tons of ore mined, and this was held unconstitutional in the case of *State v. Lakeside Land Co.*, 71 Minn. 283. But there had been no such long practical construction of the law as to mining companies. The law was a general law. There was no question of contract involved, the law not taking the form of a contract and no investment having been made in reliance thereon. And moreover, the tons of ore mined is no sort of criterion to the value of a mine, as the earnings of a railroad are a criterion of the value of a railroad. This last suggestion will be further considered under the next point.

Thus we have in Minnesota a system of railroad taxation of 40 years' standing, a system of taxation of credits nearly as old, a system of taxation of insurance companies 25 years old, the validity of which has passed unquestioned until quite recent-

ly. Not only the legislature, but the executive, the courts and every branch of the state government, and the people themselves, have during all these years considered this legislation as valid. The controlling force of a long continued practical construction of this sort is held in a line of decision in the supreme court of Minnesota, *Carson v. Smith,* 5 Minn. (Gil.) 61; *Green v. Knife Falls Boom Corp.,* 35 Minn. 161; *City of Faribault v. Misener,* 20 Minn. (Gil.) 352; *Ames v. Railroad Co.,* 21 Minn. 288; *State v. Moffett,* 64 Minn. 292; *State v. Luther,* 56 Minn. 156, 162.

The cases are also numerous in this court where it has been held that co-temporaneous interpretation of the constitution practiced and acquiesced in for years conclusively fixes its construction. *Stuart v. Laird,* 1 Cranch. 299; *Martin v. Hunter,* 1 Wheat. 304; *Cohens v. Virginia,* 6 Wheat 264; *Cooley v. Port Wardens,* 12 How. 299; *Burrow-Giles Lithographic Co. v. Sarony,* 111 U. S. 53; *The Laura,* 114 U. S. 411.

As the court forcibly put the matter in *U. S. v. Burlington Ry. Co.,* 98 U. S. 334:

> "Such has been the uniform construction given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

As shown by the opinion of the Minnesota su-

preme court in *State v. Luther,* the provision here claimed to be unconstitutional has been incorporated into every railroad grant ever made in Minnesota. These grants have been accepted in good faith and enormous sums of money have been invested in reliance thereon. It appears in the record that the Northern Pacific Railroad was built through the state of Minnesota (about 250 miles) in reliance thereon, built it is not unreasonable to assume long in advance of the possibility of profitable operation; years ahead of the time when it would have been built except for that and similar inducements. The state has been populated, its interests developed, its property made valuable by the construction of this and other railroads, and investors cannot now be put in *statu quo;* the state cannot refund what was invested in reliance upon a construction of the constitution which the court now says 30 or 40 years afterward was incorrect. The roads have during all these years paid into the state treasury three per cent. annually of their gross earnings, state and inter-state, though the power to tax interstate earnings is and always has been doubtful (*McHenry v. Alford*, p. 670). The state does not propose to refund. And the law of 1895 continues the obligation to pay the same gross earnings assessment. Negotiable bonds have been issued secured by mortgages on these railroads and have been dealt in by the commercial world in reliance on the validity of these contracts, and their validity was never challenged until in the year 1895, when the legislature passed the tax act in question.

Not only should this court follow its own judgment as to the constitutionality of the laws of 1865 and 1870, but considering the long practical construction and the large investments in reliance upon that construction, the case falls within the reason and principle of those decisions of this court, which have held, that, where when contracts are made the law of the state as interpreted by its courts is in favor of their validity, a subsequent decision of the state court to the contrary will not be followed in this court; *Gelpcke v. Dubuque,* 1 Wall. 175; *Thomson v. Lee,* 3 Wall. 327; *Mitchell v. Burlington,* 4 Wall. 270; *The City v. Lamson,* 9 Wall. 477; *Douglass v. Pike,* 101 U. S. 677.

VI.

As to the true construction of sections 1 *and* 3, *article IX of the state constitution.*

Section 1 does not differ from the provision in the organic act of the territory of Dakota, which was construed by this court in *McHenry v. Alford,* 168 U. S. 651. The organic act provided that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

This language in the organic act of North Dakota contained two prominent limitations on legis-

lative power; first, that taxes should be uniform, second, that they should be in proportion to the value of the property taxed. The organic act therefore contained all the provisions of sections 1 and 3, article IX, of the Minnesota constitution, except the one provision of article III to the effect that laws shall be passed taxing all property.

This court held in that case that there was nothing in this provision of the organic law which prohibited the legislature from passing a gross earnings law under which the railroad company paid a percentum of its gross earnings in lieu of all other taxes on the railroad and land. The case, therefore, decides (a) that such taxation is not contrary to the rule of uniformity; (b) that it is taxation *in proportion to value.* So far as the opinion of the supreme court of Minnesota in this case (72 Minn. 22) holds that the act of the legislature violates the constitutional rule of uniformity, or so far as it holds that the taxation in question is not based on value, it is contrary to the decision of this court in *McHenry v. Alford,* and contrary to the authorities which this court cited with approval, 168 U. S. 699. And when the state court says that a state could not *contract* it runs counter to the settled rule in this court which we have before referred to, that a state can make a contract on the subject of taxation.

The decision of the state court may rest partly also upon that part of section 3 which says, "Laws shall be passed taxing *all* moneys," etc., and also, "*all* real and personal property according to its true value in money." Under section 1, standing

alone, it is clear and has been decided by this court in *McHenry v. Alford,* that it is for the legislature to decide upon what property taxes are to be levied, and that the legislature may classify and arrive at the value of different species of property in different ways: it may for example tax improved property by per centage on rental or income, unimproved property directly by ascertaining its value.

Section one says, therefore, that the legislature may select the property which is to bear the burden of taxation and need not levy taxes on all property. If section 3 is to be read literally and strictly so as to compel the passage of laws taxing absolutely *all* property, it conflicts with and is contradictory of section 1.

But the two sections stand in the constitution together as both operative and as modifying each other. Some construction must be adopted which will give the fullest effect to both.

It may be pertinently pointed out that section 3 is not self-executing but is directory to the legislature. It says that laws shall be passed, etc. Suppose the legislature fails to pass any law taxing mortgages, for example, it could not be contended that mortgages were taxable. Neither, we apprehend, would a court decide that all the taxes assessed in the state were void because the legislature had not passed a law taxing mortgages. *State, Vail's Exrs. v. Runyon,* 41 N. J. Law. 98. And therefore it may well be held that section 3 was not intended to overrule section 1 so far as concerned the power of the legislature to determine

where the burdens of taxation should be placed (of course, without unjust discrimination) and to classify property into different classes for the purposes of taxation.

Take, for example, a railroad; it has no market value; there are no purchasers; so much money may be invested in it that no person or aggregation of persons would furnish the capital to buy it. Yet it has a value as a system or entity which can best be determined by its earning capacity. The same is true of the property of any corporation which is incapable of separation from the corporate franchises with which it is used, the whole constituting a taxable entity with a value depending on earning capacity, or at least which the legislature *may* determine by earning capacity. And the legislature is not confined to taxing such property by direct assessment of such part thereof as is tangible and has an ascertainable market value. *McHenry v. Alford*, p. 665-668; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Adams Express Co. v. Ohio State Auditor*, id. 185.

Mr. Morawetz, in his work on Corporations Section 929 says:

> "In speaking of the value of franchises, care must be taken to distinguish between the different meanings of the word "value." One meaning of the word is *price*, or the amount for which a thing can be sold. In this sense franchises have clearly no value whatever, because, by their nature, they are not transferable. They cannot be sold, or leased, or mortgaged, nor can they be taken on execution. On the other hand, franchises clearly have a value, if the word "value" is used to signify the ad-

> vantage derived from their possession, or, in other words, their *utility*. The value of a franchise, using the word "value" in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession."

The determination of value by rental or income can not, we submit, be held not to be a constitutional assessment according to value. It is an elementary principle of political economy that rental or earning capacity is one of the very best tests of value. And in order to hold that taxation of a railroad by an annual percentage of gross earnings is not taxation of the property according to its value, the court must overrule this fundamental principle and say that earning capacity may not be taken as a test of the value of property difficult or impossible to determine directly. The court must hold the very narrow view that no appraisal is based on value, except the ordinary direct and specific assessment of value; when we all know, as a fact, that as to all property operated under and with franchises earning capacity is the best index of value.

If this is true with respect to taxation of railroads it is true of the taxation of these land grants as a single entity with the railroad. These grants were universally granted to aid in the construction of some railroad. Take the Northern Pacific grant as an example. Its lands were granted by section 3 of the act of July 2, 1864. "For the purpose of aiding in the construction of said railroad and tele-

graph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores." The lands were held upon a trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. While held on this trust they could not be made productive; they could not be built upon cultivated, improved, and made a source of income to the company; they were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, and to paying off mortgages, the money raised upon which had constructed the road. The lands could not be sold and the proceeds appropriated by the stockholders in the way of dividends or otherwise. They are wedded to and inseparable from the railroad itself. Without them coupled with the commuted taxation, the road might not have been built. The railroad earnings are produced partly by the lands, because the value of the lands has already been borrowed thereon and put into the road; the lands are and must continue to be held to aid the road and enable it to produce earnings. *McHenry v. Alford,* pp. 660, 661, 662; *State v. Luther,* 56 Minn. 156.

The supreme court of Minnesota has held in repeated decisions, as this court held in *McHenry v. Alford,* that the commuted system of taxation in question was not an exemption. In *City of St. Paul v. St. Paul & Sioux City Railroad Co.,* 23 Minn. 469, the court said that the statute did not release the

corporate grantee from any portion of its just and equal share of taxation in respect to any of its property, but merely provided a mode of commutation therefor based upon a percentage of earnings or income agreed upon as a just equivalent equally advantageous and beneficial to the state (p. 471). We are not, therefore, asking the court to hold that the Minnesota legislature could exempt any property from taxation except that especially enumerated in section 3 *supra*. We can safely concede that it is the duty of the legislature under the constitution of the state to tax all property at its value in money. But here we have a kind of property which is *sui generis*, consisting of a franchise, with a land grant devoted to the purpose of building a railroad; the whole consisting of one entity, upon which it would be difficult—if not impossible—for any person to put a direct value in money. Instead of trying to do so the legislature has said that the whole shall be assessed each year by taking 3 per cent. of the gross earnings. Under this system, as the earnings increase taxes increase, and it is fair to assume that as value increases earnings increase. It cannot be said that this property is not taxed, neither can it be said that it is not taxed in proportion to its value. All that can be said is that the value is ascertained indirectly instead of directly. But it was for the legislature to fix the *method* of ascertaining value. There is nothing in the constitution which provides that value shall in all cases be fixed by a direct determination by an assessor, and if the *method* of

taxation here in question may be regarded as resting on *value* the selection of such *method* of arriving at value is purely a legislative question. Plainly it may be the case that this property has and would continue to pay substantially the same, or at least as much taxes, under the gross earnings system as under the other system. We believe railroad experience has shown this to be the case, but whether this is true or not the crucial question is whether the court can judicially know that this taxation has not been in proportion to value; or whether on the other hand this is not purely a legislative question.

The utmost that can be claimed by the learned attorney general is that there are three important requirements as to taxation in the Minnesota constitution; first, that laws must be passed taxing all property; second, that taxation shall be based on value; third, that it shall be uniform.

As to the first requirement, we have shown that this property is taxed.

As to the second requirement, that taxation shall be based on value, we do not think it can be controverted that the taxation in question is based on value, and it has been so decided by this court in *McHenry v. Alford.*

As to the question of uniformity, it was decided by this court in *McHenry v. Alford,* that the taxation in question was not contrary to the requirement of uniformity. The only refuge of our opponents is to say, that while the taxation in question might be uniform for one year, its uniformity is de-

stroyed because the legislature has fixed the rate of taxation for a considerable number of years, or so long as the company holds the lands unsold. The learned attorney general will, we think, be driven to concede that the property is taxed and that it is taxed on value; that the rule of uniformity is not violated unless it be on account of the rate of taxation being fixed for a considerable period. And this is the point to which the case is ultimately reduced as shown by the recent opinion of the supreme court of Minnesota (unreported) in *County of St. Louis v. Duluth and Iron Range Railroad Company,* where the court says:

> "True, these lands were conveyed for a public purpose and it may be conceded that in the absence of constitutional provisions prohibiting it, the legislature might in aid of such purpose have granted the lands exempt from taxation. But we are of opinion that under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes and apply them in advance to a specific public purpose, still, it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

There are two answers to this argument.

First, the legislature is not confined by the constitution to fixing a new rate of taxation every year. Neither is there, as we think, any provision

in the constitution which requires that the legislature shall fix the rate on *all* property at the same time or for the same term. May not the legislature fix the rate on land for five years to come and leave the rate on personal property to be fixed annually? Would that be contrary to the rule of uniformity? It must be remembered that the legislature is vested with all the power on this subject except as it is limited by express constitutional limitation. General legislative power rests in the legislature and it may fix the valuation and rate itself, or delegate such fixing to subordinate bodies. The legislature must be the judge (unless it is expressly deprived of that power) as to whether fixing the rate of taxation with respect to a certain class of property for a considerable term violates the rule of uniformity, because the rate on other classes of property is fixed annually or bi-ennially. How can the court say that thereby less taxes are collected against the property for which the rate is fixed for a considerable period? In fact all the legislature has done is to classify; the classification rests on reasonable grounds, and so far as appears all members of the class are taxed alike. *McHenry v. Alford.*

In the next place, as we think, the argument is overruled by those decisions of this court which hold that a state has power to contract with respect to taxation. We doubt if there is a single state constitution which does not contain provisions for uniformity of taxation and against discrimination. It has been argued for a hundred

years, and certain justices of this court have argued from time to time that it was incompetent for a state to contract on this subject; impossible for one legislature to bargain away the right of future legislatures to tax as they please. But this court has held uniformly that it was competent for a state legislature to make such contract. These decisions we think must be adjudications to the effect, that the courts cannot say that such contracts fairly entered into are contrary to a constitutional provision requiring uniformity of taxation; for as before stated, there is probably not a state constitution in which uniformity is not required. Moreover, these decisions are also authority for our proposition, IV, that the constitutional provisions in question have no bearing upon a contract made by the state in which it receives the full consideration for future taxes.

In *State of New Jersey v. Wilson,* 7 Cranch 164, the legislature made a settlement with Indians, by which the Indians released certain lands to the state and certain lands were purchased by the Indians with a provision that they should thereafter be subject to no tax. This was held to constitute a contract which could not be rescinded by subsequent legislation.

In *Gordon v. Appeal Tax Court,* 3 How. 133, the legislature of a state accepted from a banking corporation a payment as a consideration for the franchise granted, with a provision that the state was not to "impose any further tax or burden upon

them during the continuance of their charter under this act." Held: to be a contract which the legislature had power to make and which could not be subsequently repealed.

In *State Bank of Ohio v. Knoop,* 16 How. 369, a grant was made of a charter to a bank, providing that no more than a specified amount of taxes should be levied on its property during a term of years. The Ohio constitution contained substantially section 3 of Article IX of the Minnesota constitution. Minnesota adopted it from Ohio. But this court held that the state had a right to make the contract, reversing the supreme court of Ohio which had decided to the contrary. This case was followed by *Jefferson Bank v. Skelly,* 1 Black which involved the same state of facts, and in both cases this court distinctly declined to follow the decision of the supreme court of Ohio to the effect, that the legislature had no power under the constitution of Ohio then existing to make the contract in question.

In *University v. People,* 99 U. S. 309, this court construed a grant of exemption from taxation made by the legislature of Illinois to Northwestern University and held that a later statute impaired the obligation of the grant of exemption. The case was a writ of error to the supreme court of Illinois and the state court had held that the original contract made in 1855 was invalid, because in conflict with the state constitution of 1848. The state court had held that the legislature in 1845

had no right under the state constitution to exempt anything except property in immediate use for school purposes; but this court reversed that decision, holding the construction placed by the supreme court of Illinois on the state constitution was erroneous.

In *Asylum v. New Orleans,* 105 U. S. 362, an institution for the relief of destitute females had been incorporated in 1853 by act of general assembly which exempted all the property of the corporation from taxation. A decision of the supreme court of Louisiana held, construing this exemption, that it did not include certain kinds of property, but this decision was reversed in this court.

Various decisions in the state courts bear on the question.

The constitution of Wisconsin provides: "The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe." Under the constitution of Wisconsin the question had been very much mooted and had been passed on or touched upon by different decisions of the supreme court from an early day, which decisions were not altogether consistent with each other. The question finally came before the supreme court of that state in *Wisconsin Central Railroad Company v. Taylor County,* 52 Wis. 37. It was elaborately considered by the court in its opinion, page 57, and subsequent pages, and the gross earnings tax upon railroad lands was held valid.

The constitution of Iowa (adopted 1846, sec. 30,

Art. 3) declares "the general assembly shall not pass local or special laws * * * for the assessment and collection of taxes for state, county or road purposes * * * and in all * * * cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision it was decided that an act of the legislature was valid, exempting all property, including the residences of professors, upon the grounds of literary institutions, and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings, without income to the owners. *Trustees of Griswold College v. Iowa,* 46 Iowa 275.

Section 1, Article 11, of the constitution of Kansas, adopted in 1859, provides "the legislature shall provide for a uniform and equal rate of assessment and taxation." This is a very strong section, not only requiring uniformity of rate but equality of rate; but an act providing a different method of assessing and collecting taxes on railroad property than other property was held not to be unconstitutional. *Railroad Company v. Morris,* 7 Kan. 210. And in *Francis v. Railroad Company,* 19 Kan. 303, it was held, Brewer, J., giving the opinion of the court, that an act of the legislature providing for the collection of state taxes directly through the machinery of the state government, on railroad property in unorganized counties of the state, *where no other property was taxed,* was not in violation of this constitution.

The constitution of Louisiana provided "taxation

shall be equal and uniform throughout the state. After 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied." In *Louisiana State Lottery Co. v. New Orleans,* 24 La. An. 86, it was held that the lottery company might be exempted from ordinary taxation in consideration of its annual payment into the state treasury of a certain amount for the benefit of the school fund. And in *New Orleans v. Kaufman,* 29 La. An., 283, it was held that the constitution did not prohibit the legislature from dividing the objects of taxation into different classes and imposing different taxes on each class. It merely required that the tax on each member of the same class should be the same. See also *New Orleans v. Davidson,* 30 La. An. 554, and *New Orleans v. Fourchy,* 30 id., 910.

The constitution of Michigan adopted in 1850, provided "the legislature shall provide a uniform rate of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." And section 12 said "all assessments hereafter authorized shall be on property at its cash value." In *People v. The Auditor,* 7 Mich. 84, an act of the legislature of 1853, remitting certain taxes for the term of five years to the contractors of a ship canal under a land grant to aid the canal, was held valid, Martin, C. J., saying:

> "This provision of the constitution has no reference to the power to exempt or to remit taxes, which is, and necessarily must be, to a great extent, left to the discretion of the legislature. * * * The legislature has the power of prescribing the subjects of taxation and of exemption, but it cannot arbitrarily tax property according to locality, kind or quality without regard to value, but in this respect it must act by uniform rule. But to exempt property as is done in the case of church, school, or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation. Pages 90, 91."

Manning, J., said also:

> "There is nothing in the constitution in express terms inhibiting the enactment of the law by the legislature * * * The two sections taken together mean that all descriptions of property *subject to taxation* shall pay such proportion of a tax as their cash value bears to the aggregate cash value of the whole property subject to the tax."

And the judges agree that it was competent for the legislature to exempt the lands from taxation for five years. See, also, the opinion of the court by Judge Cooley in *Youngblood v. Sexton,* 32 Mich. 406.

The constitution of New Jersey, adopted in 1875, provided "property shall be assessed for taxes under general laws and by unifrom rules, according to its true value." Under this provision it was held that an act exempting mortgages from taxation, except under certain conditions, was constitutional. *State, Vail's Exrs. v. Runyon,* 41 N. J. Law. 98.

Section 1 of Article 9 of the new constitution of Pennsylvania, adopted in 1873, provides, "all taxes

shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt" certain property named. In *Kittanning Coal Co. v. Commonwealth,* 79 Pa. St. 100, it was held that an act taxing coal companies on their franchises according to the amount of coal mined is constitutional. Agnew, C. J., said, in the opinion of the court:

> "Clearly there is nothing in this (constitutional provision) prohibiting the power to classify. Will it be argued that persons or the owners of property cannot be classified? For example: can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules or of cattle cannot be taxed upon their horses, mules and cattle at a certain rate? Or that the owner of unseated lands, or farms or mills, or houses and lots cannot be taxed at a uniform rate? What difference is there between saying that all horses and mules shall be taxed at a certain rate and saying that the owners of these horses and mules shall be taxed at the same rate upon them? The distinction is evidently unmeaning. Persons pay taxes, not property. This is so even when the remedy for the recovery of the tax is *in rem.* The law only takes hold of the property as a means of enforcing the duty of the person. When the constitution enjoins uniformity of taxation, it is because of the right of the citizen, not of a right possessed by his property. * * * Hence, when the constitution said that all taxes shall be uniform upon the same class of subjects within a given territory, it did not mean to separate the property from its owners, or that property and not persons should pay taxes. This would be simply absurd, for inanimate things cannot

> perform duties. Taxes shall be uniform, because of the right of the citizen to bear no more than equal burdens. * * * But without the power to classify men, as well as things, this undesirable inequality cannot be avoided; for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden. And among corporations or artificial persons the same result will take place. * * * But by classification this inequality between persons, natural or artificial, can be avoided. It is clear, therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class. * * * We must conclude therefore that a classification of coal mining and purchasing and selling companies is not beyond the legislative power, and the tax being clearly uniform upon their business measured by the extent of it, is not only within the meaning of the constitution, but is equal and just."

The constitution of Mississippi provided, "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." In *Mississippi Mills v. Cook*, 56 Miss. 40, a statute was sustained providing for the exemption of all factories "for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials."

The constitution of Illinois provided "the general assembly shall provide for levying a tax by valua-

tion, so that every person and corporation shall pay a tax in proportion to the value of his or her property." But the exemption of the Illinois Central Railroad Company from ordinary taxation in consideration of paying into the state treasury a percentage of its gross earnings was held valid in *Illinois Central Railroad Co. v. McLean,* 17 Ill. 291. In the case of *Hunsacker v. Wright,* 30 Ill. 146, it appeared that the charter of a city provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose, and the property within the city should be exempt from taxes levied for county purposes; provided the city should support the resident paupers thereof, and pay the expenses of the circuit court in all criminal cases for offenses committed by citizens, and all jail fees accruing therefrom. The court held that while under the Illinois constitution the legislature could not exempt a person or community of persons from their share of the public burdens, still the legislature might commute a tax for an equivalent burden, and that in commuting the general assembly was the sole judge of the sufficiency of the equivalent to be received in lieu of the tax.

In Arkansas the constitution provided "all property subject to taxation shall be taxed according to its value---that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another

species of property of equal value." The decisions under this provision are quite numerous and for lack of space we merely refer to them. They will be found to sustain our contention. *State v .Crittenden County,* 19 Ark. 360; *St. Louis R. R. Co. v. Berry,* 41 Ark. 509; *Arkansas Midland Ry. Co., v. Berry,* 44 Ark. 17; *Cairo Railroad Co. v. Parks,* 32 Ark. 131; *Memphis Railroad Co. v. Berry,* 41 Ark. 436.

VII.

We have presented the case thus far without any reference to the constitutional amendment of 1871, Art. IV, sec. 32a, which reads as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing, or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

Even assuming, for the purposes of the argument, that the laws providing for the payment of a percentage of gross earnings in lieu of all other

taxes were void when enacted, yet they were rendered valid and binding contracts by the above amendment.

When the provision of the federal constitution prohibiting a state from passing any law violating the obligation of a contract is invoked, one of the points which the federal court must determine is whether there was any such contract as is claimed to have been violated, and in determining this question the federal court is not controlled by the decision of the state court, even if it involves the construction of a statute or the constitution of such state. So here, assuming that the laws passed by the state of Minnesota were void when enacted because in conflict with the state constitution and therefore not binding contracts, it is still a federal question whether the state did not thereafter by amending its constitution ratify those laws and make them valid contracts binding upon the state.

In order to fully appreciate the force and effect of this constitutional amendment, it is necessary to take into consideration the history and condition of legislation on this subject at the time it was made.

When this constitutional amendment was adopted all the railroads in Minnesota were paying a percentage of their gross earnings in lieu of all other taxation. There was no general law providing for this method of taxation, but each railroad was paying its taxes in this way by virtue of some special law in the form of a contract with the state. This method of taxing railroads had

been inaugurated by the territory of Minnesota before the organization of the state. (Chap. 1, Laws of Minnesota, Extra Session of 1857.) The territory, when granting charters to various railroads, had provided that the payment of three per cent of their gross earnings should be in lieu of all other taxation and most of the railroad companies operating in the state in 1871 were organized under such territorial charters and paying their taxes under contracts made with the territory. A few railroads were paying similar taxes under similar contracts made with the state after its organization, one of which was the Lake Superior and Mississippi Railroad Company, the predecessor of the St. Paul and Duluth Railroad Co., and another the Northern Pacific Railroad Co. Prior to 1871, the state legislature had, at various times, at the request of the various railroads, reduced the percentage of gross earnings which the railroad companies had theretofore agreed to pay. This reduction, however, was only to continue for a limited period. (See chapter 2, Special Laws, 1861, chapter 17, Special Laws 1862, and chapter 2, Special Laws 1863, as to Minneapolis & Cedar Valley Railway Co.; chapter 18, Special Laws 1862, chapter 1, Special Laws 1864, as to Root Rover Valley and Southern Minnesota Railroad Company and its successors; chapter 4, Special Laws 1864, chapter 6, Special Laws 1865, chapter 52, Special Laws 1870, as to the Minnesota & Pacific Railroad Company and its successors; and chapter 10, Special Laws 1865, as to the Winona

& St. Peter Railroad Company, successor of the Transit Railroad Company.)

This action of the legislature reducing the percentage of gross earnings to be paid by railroads had caused dissatisfaction and the amendment to the constitution was adopted to prevent the legislature from making any further changes favorable to the railroad companies at the request of those companies unless such changes were expressly ratified and adopted by the popular vote.

It must also be taken into consideration that two years before the adoption of this amendment, the supreme court of the state had held in the case of *First Division v. Parcher, supra,* that the laws passed by the territory and accepted by the railroad companies, providing for the payment of gross earnings taxes in lieu of all other taxation were valid contracts binding upon the state and irrepealable. It must, therefore, have been well understood that the legislature could not amend or modify those territorial laws without the consent of the railroad companies interested.

This was the situation when the amendment was adopted and the amendment must be construed with reference to those conditions.

An examination of the language of the amendment shows that its purpose was not to modify or change any of the laws providing for the commuted system of taxation in any respect, but it impliedly recognizes the existing laws as valid and puts a check upon the legislature to prevent its consenting to any change being made in them at the

request of the railroad companies, unless the people assented to such change by popular vote.

This amendment recognized the validity of the gross earning laws and therefore, even if prior to that time those laws which had been enacted since the adoption of the state constitution were invalid because in conflict with its provisions, yet by this amendment they were ratified and made as valid and effectual as if they had been expressly authorized when enacted. The supreme court of the state has held that this was the effect of the amendment in *State v. Luther, supra,* with reference to the Act of 1865, now under consideration. This doctrine was reaffirmed by the same court in the decision which is now here for review, but it held further that the ratification of those laws by the adoption of the amendment was only a qualified ratification and that there was an implied reservation of the right to repeal or amend such laws without the consent of the railroad companies affected.

The question then is this, was the effect of the amendment to ratify and validate those laws as they stood or was the effect of it to ratify them in part and modify them in other respects. We assert that there is nothing in the amendment that indicates any intention to take any thing away from the laws as they stood on the statute books, but that the whole purpose was to preserve them as they were and to place an additional check upon their amendment or repeal. These laws, as they were enacted, were in the form of contracts and

they are the laws that were recognized as valid and ratified and not some other laws less burdensome upon the state. There is nothing to indicate that the people intended to assert the right to change them without the consent of the railroad companies interested, but it is apparent that they did intend to provide that the railroad companies and the legislature of the state could not thereafter agree upon a modification of the laws and make them more favorable to the railroads without the express consent of the people by popular vote. That such was the intention of the people and that this is the construction that should be placed upon the amendment appears more clearly when we take into consideration that the amendment applies chiefly to laws passed by the territory which were binding, irrepealable contracts. The people of the state had no power to reserve any right to repeal or modify those contracts without the consent of the railroad companies interested; so, as to the territorial laws, it is clear that the amendment only referred to such a repeal or amendment made *with the consent of the companies interested* and it is apparent that no distinction is made in the amendment between territorial laws and state laws; it was intended to affect both in the same manner. The effect of this amendment to the constitution was to ratify Chap. 8, Laws 1865, and Chap. 65, Laws of 1870, as they stood, and being contracts they are ratified as contracts without any qualification or reservation.

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